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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 863.

DARREL W. JONES,
Petitioner,

vs.

CHARLES J. FARONI, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

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No. _____.

DARREL W. JONES,

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vs.

CHARLES J. FARONI, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this above case on September 29, 1965; Rehearing was denied October 27, 1965.

CITATIONS TO OPINIONS BELOW.

The Journal Entry of the Common Pleas Court is unreported and is printed in the appendix, *infra*, p. 18.

The Memorandum Opinion of the Court of Appeals is unreported and is printed in the appendix, *infra*, p. 19.

The Journal Entry of judgment of the Court of Appeals is unreported and is printed in the appendix, *infra*, p. 19.

The judgment of the Supreme Court of Ohio, dismissing the appeal is unreported and is printed in the appendix, *infra*, p. 20.

The judgment of the Supreme Court of Ohio overruling the Motion to Certify is unreported and is printed in the appendix, *infra*, p. 20.

The order of the Supreme Court of Ohio denying the rehearing is unreported and is printed in the appendix, *infra*, p. 20.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on September 29, 1965. Rehearing was denied on October 27, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). There is in this case a claimed denial to petitioner of due process of law and equal protection of law by the Courts of Ohio through their non-enforcement of State Constitutional, Statutory Provisions and judicial decisions in this case.

QUESTIONS PRESENTED.

1.

Is it not prejudicial error and/or abuse of discretion for a trial court to set aside a unanimous jury verdict and final judgment entered thereon and refuse to set forth the grounds (facts) timely requested, upon which said new trial was granted, even though O. R. C. Section 2505.02 mandatorily requires, in this case, that the same be set forth? *infra*, p. 14.

2.

Is it not prejudicial error and/or abuse of discretion for a trial court to set aside a unanimous jury verdict and final judgment entered thereon and order a new trial without setting forth the causes (reasons) therefor as mandatorily required by O. R. C. Section 2321.17? *infra*, p. 15.

3.

Does the trial court have legal authority to set aside a unanimous jury verdict and final judgment entered thereon on the weight of the evidence even though the Constitution of Ohio grants this right to a unanimous Court of Appeals only? (Article IV, Section 6, *infra*, p. 14.)

4.

Did the state courts of Ohio, by their refusal to enforce the law of Ohio in this case, deny to petitioner due process of law and equal protection of law as guaranteed to petitioner by the Fourteenth Amendment to the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The relevant constitutional and statutory provisions are set forth in the appendix hereto, commencing at page 14, *infra*. They are: Constitution of the United States, Fourteenth Amendment; Constitution of Ohio, Article IV, Section 6; Ohio Revised Code, Sections 2505.02, 2321.17, 2321.18 and 2323.15.

STATEMENT OF THE CASE.

On March 6, 1964, after seven trial days, a unanimous jury verdict was returned for the petitioner (plaintiff) on his petition in the amount of $11,500.00 against the respondent (defendant), and in favor of the plaintiff on the defendant's cross-petition; final judgment was entered thereon in conformity with O. R. C. Section 2323.15, *infra*, p. 16.

On March 13, 1964, respondent filed a Motion for judgment Non Obstante Veredicto and Motion for New Trial.

On June 2, 1964, Petitioner filed a motion to have the court state the grounds (facts) in its order upon which a new trial would be based; *infra*, p. 18. (O. R. C. Section 2505.02, *infra*, p. 14.)

O. R. C. Section 2321.17 requires that a trial court must specify in writing the causes (reasons) for which a new trial is granted; *infra*, p. 15.

On July 15, 1964, the motion for judgment non-obstante veredicto (motion for judgment) was overruled and the trial judge granted a new trial setting aside the verdict and final judgment entered thereon stating in his order:

> "* * * The court is of the opinion that the verdict of the jury rendered herein is so manifestly

against the weight of the evidence as to show a misconception by the jury of its duties in the premises * * *." *infra*, p. 18.

This is the only conclusion given by the trial court—the judge gave no written opinion or facts to support his opinion which is contrary to the mandatory statutory law of Ohio.

The following is a summary of the trial evidence in this case:

On Sunday, May 1, 1960, at about 2:30 P.M., the petitioner was operating a two door Chevrolet automobile west on Highland Road with a front seat passenger therein. Suddenly a four door Dodge automobile being operated east by respondent drove across the marked center line onto petitioner's side of the highway. Petitioner applied his brakes and skidded 25 feet on his side of the highway to avoid respondent, but was struck by respondent and pushed off the highway (R. 8, 9 and 10). Petitioner's testimony was corroborated by his front seat passenger, Robert Ulizza (R. 225), and the photographs of which petitioner's Exhibit 4, reproduced opposite page 6, clearly show skid marks straight as an arrow laid down by petitioner's automobile on petitioner's side of the highway. At the point of contact petitioner's four tires left skid marks at about a 45° angle as he was pushed northwest off the highway by respondent. The longest skid mark was 25 feet as measured by Officer Zalatel (R. 182). All other photographic exhibits are merely cumulative evidence corroborating petitioner's testimony. (The original photographs are contained within the Bill of Exceptions.)

Petitioner's injuries all stand uncontradicted. Respondent offered no evidence whatsoever to rebut said injuries. Petitioner suffered $1,500.00 damages to his

automobile (R. 53); a permanent neck injury resulting in limitation of motion thereof and a permanent scar on the top of his head (Dr. Bilsky, R. 82-83) all for his life expectancy of 38 years (R. 251); impaired earning ability and lost wages (R. 132 to 142).

Respondent filed an answer and cross-petition. Respondent testified that it was his intention to make a left turn into the driveway on the north side of Highland Road, but that he was stopped on his side of the highway, south of the center line, when petitioner skidded across the center line striking his standing automobile on respondent's side of the highway (R. 58 to 68). Respondent also testified that petitioner was speeding about 50 to 55 M.P.H. (R. 267). **All respondent's testimony is uncorroborated.** Respondent's wife, Lucy Faroni, was a front seat passenger, but testified that she did not see the collision (R. 254).

Respondent offered Clarence Leo Harris as his witness who testified that he did not see the collision, but heard same and went to the scene; that both petitioner and his passenger were intoxicated (R. 325).

Petitioner testified, as did five rebuttal witnesses, including the investigating police officers, that petitioner and his passenger were not intoxicated (R. 345-393); and police officer, Frank J. Zalatel, testified that he knew Clarence Leo Harris before the collision and did not see him at the scene of the collision, even though officer Zalatel was the first officer to arrive and the last to leave the scene, and further, that he had searched the area for witnesses (R. 393).

Respondent offered Dr. James G. Jones, M.D., as his witness who was permitted to testify over petitioner's objection. Dr. Jones testified that he never examined the petitioner; had never seen the petitioner before entering the court room; was asked no hypothetical questions re-



garding petitioner's injuries, and was permitted by the judge to talk generally about neck and back injuries (R. 269 to 279).

On March 6, 1964, after seven trial days a unanimous jury found for the petitioner (plaintiff) on his petition and awarded $11,500.00 as damages, even though the prayer was for $26,500.00; and

Further found for the plaintiff on the defendant's cross-petition; and on the same day, March 6, 1964, said verdict (*infra*, p. 17) was reduced to final judgment and journalized, *infra*, p. 17.

> "* * * The fact that the verdict is contrary to the evidence or to the weight of the evidence is ground for a new trial provided there is substantial evidence adduced to support a verdict contrary to the one returned * * *" 66 *Corpus Juris Secundum*, Section 70, page 206.

What are the facts: Each accused the other of crossing the center line of the highway.

1. Petitioner's photographs show conclusively that the accident happened on petitioner's side of the highway.

2. Respondent accused the petitioner of three things:

(a) Crossing the center line—proved not true by police photographs.

(b) Speeding—uncorroborated and denied by petitioner and his passenger.

(c) Intoxication—denied by six rebuttal witnesses.

Petitioner's injuries all stand uncontradicted by any evidence whatsoever since none was offered by respondent.

Why didn't the trial judge set forth the facts to support his opinion? He could not—his action was arbitrary.

REASONS FOR ALLOWING THE WRIT.

QUESTION 1.

Must the trial judge set forth in the order the grounds (facts) supporting his opinion, timely requested, when he orders a new trial setting aside a judgment?

Reasons.

Petitioner's motion timely requesting the grounds under O. R. C. Section 2505.02 is set forth *infra*, p. 18.

O. R. C. Section 2505.02, *infra*, p. 14, states in part:

> "* * * The court upon the request of either party, shall state in the order the grounds upon which the new trial is granted and the judgment vacated or set aside * * *."

This section also gives a party the right to appeal said order setting aside the judgment as a matter of right. It is obvious that the trial judge must give the facts upon which his opinion is founded in ordering a new trial and setting aside the judgment; failure to do so is reversible error. Said facts obviously are needed for the appeal as allowed by this section.

This is the only statutory section in Ohio wherein a party may request the facts for the trial court's actions in ordering a new trial.

There is no Ohio case law interpreting this section. A careful reading of the entire section, *infra*, p. 14 (O. R. C. Section 2505.02) leaves no doubt as to its meaning.

> "Failure of a court to state in an order granting a new trial the grounds upon which it acts at the request of a party is reversible error." *Lawrence vs. Moore*, 91 O. App. 125, 107 N. E. (2d) 551 (1950).

The opinion of the Ohio Supreme Court as stated in the *Lawrence* case was that the only way the Court of Appeals could obtain jurisdiction over said appeal was if the order was final. At the time of the *Lawrence* case, *Webster vs. Pullman Co.*, 51 Ohio App. 131, 200 N. E. 188 (1935) was the law, which stated an abuse of discretion in ordering a new trial made the order final, otherwise the Court of Appeals did not acquire jurisdiction over the appeal.

The Ohio Courts of Appeals are Constitutional Courts and at said time only had authority to review "final orders, judgments and decrees." Since no abuse of discretion was raised in the *Lawrence* appeal the Court of Appeals did not obtain jurisdiction over said appeal. The Ohio Supreme Court, therefore, ordered the Court of Appeals to reverse and dismiss the *Lawrence* case for lack of jurisdiction. 156 Ohio State 375; 102 N. E. (2d) 595 (1951).

In (1947) O. R. C. Section 2323.15 (Section 11599), *infra* p. 16 as adopted required that a judgment be entered on the verdict. The order granting a new trial would then set aside a judgment instead of a verdict thus giving the Court of Appeals jurisdiction under O. R. C. Section 2505.02, *infra*, p. 14.

Green v. Acacia Mutual Life Insurance Co., 156 O. S. 1, 100 N. E. (2d) 211 (1951), held that the judgment entered under O. R. C. Section 2323.15 (Section 11599) was not a final appealable judgment as stated by O. R. C. Section 2505.02 since the trial court had control over said judgment until the motions were ruled upon or the time passed for filing same. They called this a Pro-Forma judgment.

The Supreme Court of Ohio decided *Price v. McCoy Sales and Service, Inc.*, 2 Ohio St. (2d) 131; 207 N. E. (2d)

236 (1965) overruling the *Green* case and held that said judgment was final:

> "(1) The granting of a motion for a new trial is a final appealable order as provided in Section 2505.02 of the Revised Code. Green v. Acacia Mutual Life Ins. Co., 156 Ohio St. 1, overruled; Youngstown Municipal Ry. Co. v. City of Youngstown, 147 Ohio St. 221, approved and followed. * * *"

Now the order setting aside the final judgment is a final order and the Court of Appeals now obtains jurisdiction over said appeal as a matter of right.

It is clear that the *Lawrence* case would be the law in Ohio today since a showing of an "abuse of discretion" in ordering a new trial is no longer necessary in order for the Court of Appeals to acquire jurisdiction over said appeal. The appeal is now a matter of right.

It is also clear that the trial court set forth no facts in ordering the new trial as required by statutory law in this case which is clearly reversible error.

QUESTION 2.

Must the trial judge specify in writing the causes (reasons) for which a new trial is granted?

Reasons.

O. R. C. Section 2321.17 *infra*, p. 15; sets forth the causes for granting a new trial; at the end of said section effective 9-9-57 is the following:

> "When a new trial is granted, the Court shall specify in writing the causes for which such new trial is granted."

On May 5, 1965, the Supreme Court of Ohio decided *Price v. McCoy Sales and Service, Inc.*, 2 Ohio St. (2d) 131; 207 N. E. (2d) 236:

"* * * (2) The trial court must specify in writing the causes for which a new trial is granted. (Section 2321.17, Revised Code.)

Section 2321.17, Revised Code, as amended in 1957, requires a trial court to specify a valid reason for granting a new trial. If that court does not specify such a reason in granting a new trial, its order can no longer indicate that the new trial might have been granted for a reason wholly within the discretion of the trial court * * *. p. 243."

The trial court gave no reasons for its action in ordering the new trial other than the conclusion stated in the order that the verdict of the jury is so manifestly against the weight of the evidence as to show a misconception by the jury of its duties in the premises.

The failure to give reasons certainly should be reversible error.

QUESTION 3.

Does a trial judge in Ohio have authority to set aside a final judgment entered on a verdict of the jury on the weight of the evidence and order a new trial?

Reasons.

On January 1, 1945, Article IV Section 6 (Appellate Section) of the Ohio Constitution was adopted as amended to read:

"* * * No judgment of any court of record entered on the verdict of the jury shall be set aside or reversed on the weight of the evidence except by the concurrence of all three judges of a court of appeals * * *."

Effective September 27, 1947 the Ohio trial procedure was changed by O. R. C. Section 2323.15 (11599), *infra*, p. 16; so that a judgment had to be entered on a

verdict. Motions for judgment and new trial are now directed to the final judgment instead of the verdict.

O. R. C. Section 2321.18, *infra*, p. 16, granting the trial court authority to order not more than one new trial on the weight of the evidence was in existence prior to September 27, 1947. The trial court was then dealing with verdicts—not judgments.

The people of Ohio by Constitutional amendment (Article IV, Section 6) and legislative enactment (O. R. C. Section 2323.15) have taken from a trial judge the right to set aside a verdict and judgment entered thereon on the weight of the evidence and have given this right to a unanimous Court of Appeals only.

QUESTION 4.

Have Petitioner's rights as guaranteed under the Fourteenth Amendment to the Constitution of the United States of America been denied to petitioner by the State Courts of Ohio in their refusal to enforce the law of Ohio in this case?

Reasons.

When the Court of Appeals entered their memorandum opinion, *infra*, p. 19 (11 March 1965); and reduced their opinion to judgment, *infra*, p. 19 (10 April 1965); overruled the Application for Reconsideration (10 April 1965); the *Green* case, *supra*, p. 9, was the law in Ohio;

On 29 April 1965 petitioner perfected his appeal to the Supreme Court of Ohio giving them jurisdiction over said appeal;

On 5 May 1965 the *Price* case, *supra*, p. 9, was decided by the Supreme Court of Ohio overruling the law of over 50 years duration.

Petitioner's appeal to the Ohio Supreme Court was prosecuted as a matter of right (Constitutional question) dismissed, *infra*, p. 20; and also on a Motion to Certify (question of great general interest) overruled, *infra*, p. 20.

Petitioner was taken by surprise when the Supreme Court of Ohio refused to enforce the law of Ohio in this case. Petitioner's appeal was pending in the Ohio Supreme Court when the changes were effected by the *Price* case. At his first opportunity, petitioner filed a Motion for a Rehearing, within rule, raising a denial of due process of law and equal protection of the law as guaranteed to Petitioner by the Fourteenth Amendment to the Constitution of the United States of America. Said Motion for Rehearing was denied on October 27, 1965, *infra*, p. 20.

CONCLUSION.

Petitioner has been arbitrarily deprived of the benefit of a jury verdict. Further petitioner had a property right in the final judgment in this case which was taken without due process of law. A denial of justice destroys confidence in the Courts.

Every person in the State of Ohio, as well as the United States of America has a vital interest in this case for a denial of justice to one is a denial of justice to all.

If petitioner is to receive equal justice under law it must be provided by this Court in this case.

Petitioner respectfully moves that his petition for Writ of Certiorari be granted.

GORDON T. CANNING, JR.,
Attorney for Petitioner.

APPENDIX.

CONSTITUTIONAL PROVISIONS.

Constitution of the United States of America, Fourteenth Amendment.

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Constitution of Ohio, Article IV, Section 6.

"* * * No judgment of any court of record entered on the verdict of the jury shall be set aside or reversed on the weight of the evidence except by the concurrence of all three judges of a court of appeals * * *." (Amended and adopted 1-1-45.)

OHIO REVISED CODE SECTIONS.

FINAL ORDER.

2505.02. Final order.

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

When a court makes such an order granting a new trial, setting aside or vacating a judgment, the court upon the request of either party, shall state in the order the grounds upon which the new trial is granted and the judgment vacated or set aside."

MOTION FOR NEW TRIAL.

2321.17. New trial defined; causes for granting new trial.

"A new trial is a re-examination, in the same court, of the issues after a final order, judgment, or decree by the court.

A final order, judgment, or decree shall be vacated and a new trial granted by the trial court on the application of a party aggrieved, for any of the following causes affecting materially his substantial rights:

(A) Irregularity in the proceedings of the court, jury, referee, master, or prevailing party, or any order of the court or referee, or abuse of discretion, by which he was prevented from having a fair trial;

(B) Misconduct of the jury or prevailing party;

(C) Accident or surprise which ordinary prudence could not have guarded against;

(D) Excessive damages, appearing to have been given under the influence of passion or prejudice;

(E) When the action is upon a contract or for the injury or detention of property, error in the amount of recovery, whether too large or too small;

(F) That the final order, judgment, or decree is not sustained by sufficient evidence, or is contrary to law;

(G) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at the trial;

(H) Error of law occurring at the trial and excepted to by the party making the application.

When a new trial is granted, the court shall specify in writing the causes for which such new trial is granted. (127 v. 142. Eff. 9-9-57.)"

2321.18 (11577). New trial or reversal granted only once.

"The same trial court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case."

MANNER OF GIVING AND ENTERING JUDGMENT.

2323.15 (11599). Journal entry of judgment approved by court.

"When a trial by jury has been had and a verdict rendered, unless the court orders the case reserved for future argument or consideration, a journal entry of judgment in conformity to the verdict shall be approved by the court in writing and filed with the clerk for journalization. (125 v 668. Eff. 10-27-53.)

VERDICT OF THE JURY.

The jury in this case, being duly empaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, do find for the Plaintiff in the sum of Eleven Thousand Five Hundred Dollars ($11,500.00).

And we do further find for the plaintiff on the claim set up in the cross-petition of defendant.

1. Gilbert J. Nock, Foreman
2. Mabel Prezy
3. Carl A. Lemlike
4. Joseph J. Popovic
5. Leo J. Wailand
6. Anna Belle Quigley
7. Emogine Soneufield
8. Doris M. Patison
9. Harold Taylor
10. Margaret Beathe
11. Silvia J. Rosa
12. John Lee Long

JUDGMENT OF THE COMMON PLEAS COURT.

(Dated March 6, 1964)

The Jury in this action on the 6 day of March, 1964 returned a verdict for the plaintiff in the sum of $11,500.00 against the defendant on his petition and in favor of the plaintiff on the defendant's cross-petition, judgment is hereby rendered in favor of Darrell W. Jones, Plaintiff, in the sum of $11,500.00 and costs.

(s) F. T. MATIA,
Judge.

MOTION TO STATE GROUNDS FOR GRANTING NEW TRIAL.

(Dated: 2 June, 1964.)

"Now comes the plaintiff, Darrell W. Jones, by and through his attorneys, respectfully request the court, in the event it grants a new trial in this action, to state in the order the grounds on which such new trial is granted and the judgment vacated and set aside."

JOURNAL ENTRY OF THE COMMON PLEAS COURT.

(Dated: 15 July, 1964.)

"This case came on to be heard on the defendant's motion for judgment Non Obstante Veredicto and motion for new trial.

The motion for judgment Non Obstante Veredicto is overruled.

The Court is of the opinion that the verdict of the jury rendered herein is so manifestly against the weight of the evidence as to show a misconception by the jury of its duties in the premises, and by reason thereof the motion for new trial is granted, and judgment entered herein on the 6th day of March, 1964, is vacated and a new trial of this cause ordered."

(s) FELIX T. MATIA, *Judge.*

MEMORANDUM OPINION OF COURT OF APPEALS.

(Dated: 11 March, 1965.)

"Judgment affirmed. Upon a careful review of the record we cannot say the trial court abused its discretion in granting a new trial and upon due consideration we likewise overrule the other assignments of error. Exceptions. O. S. J. (Artl, P.J., Kovachy, J., Corrigan, J., concur.)"

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Dated: 10 April, 1965.)

"This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court of Cuyahoga County is affirmed and it is ORDERED that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ORDERED that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution."

ORDER OF THE SUPREME COURT DISMISSING APPEAL AS OF RIGHT.

(September 29, 1965.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

ORDER OF SUPREME COURT OVERRULING MOTION TO CERTIFY.

(September 29, 1965.)

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT DENYING REHEARING.

(October 27, 1965.)

It is ordered by the Court that rehearing in this case is denied.